In the
Supreme Court of the United States

October Term, 1967

No. 219

THE PEORIA TRIBE OF INDIANS
OF OKLAHOMA, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States
Court of Claims

Petition for Certiorari Filed June 5, 1967

Certiorari Granted October 9, 1967

REPLY BRIEF

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The Government first argues the undisputed rule (which in part is a rule of construction) that the Government is not liable for interest on claims in the absence of an "affirmative, clear-cut, unambiguous" provision therefor in the treaty, statute or contract sued upon. The Government

chooses to redefine for petitioners the nature of their claim in order to attempt to force this case into the rule. Petitioners do not seek "interest on a claim," but rather damages, measured by interest, for failure to invest under the express provisions of Article 7, proceeds which would have been received but for the Government's deliberate breach. The Government argues that Article 7 was merely an agreement to invest whatever might have been actually received.

In order to make this argument, the Government must distinguish the *Mille Lac* (229 U.S. 498) and *Blackfeather* (155 U.S. 180) cases, both of which hold that agreements to pay a return cover not only funds actually received but also funds which the Government should have received. In its brief, the *Mille Lac* case, which is the closest to the case at bar, is referred to only in a footnote without discussion, and the *Blackfeather* case is distinguished on the ground (p. 12) that a rate of interest was specified in the Shawnee treaty there under consideration.

The *Mille Lac* and *Blackfeather* cases are the same as this case insofar as they hold that provisions respecting the employment of the Indians' capital extend to funds which should have been received as well as those which were actually received. The absence of a specified rate of return from the Indians' capital in the Peoria treaty was, as noted in Judge Davis' dissent (A. 78), apparently "to assure the Indians the possibility of a greater amount obtainable from private investments, not to cut off the Indians' right to the fair proceeds of their money which were retained by the Government and not handed over to them [Citation]. That right was preserved."

The Government attempts to use the fact that a rate of return is not specified and we cannot know with complete certainty what the results would have been had the Government in good faith complied with the provision to invest the proceeds of what should have been received in "safe and profitable stocks." That we do not know,

states the Government, "in what securities, at what rate, and with what success" the Indians' money would have been invested is "a strong indication that Congress has not made the United States liable for interest in this case."

The fact that we cannot have complete certainty on the results that actual investment would have produced has no bearing on either the intent of Congress (which is expressed unambiguously in the treaty, as the Government elsewhere concedes) nor on the Indians' right to recover, nor on the ascertainability of damages. The Government has overlooked the well established rules, cited in petitioners' original brief (p. 13), for ascertaining damages in such cases. The general trust law requires that damages for failure to invest be that which would have been received, or the legal rate of interest. The Government, as a self-appointed trustee, can certainly be held to the same standard in terms of either, at a minimum, the interest which it itself paid on Indian trust funds, or the larger amount that might have been realized by investment. That a trustee could escape liability for failure to invest is unthinkable. The standard set forth in this treaty is "safe and profitable stocks," and the minimum standards should certainly be the rate of interest actually paid on Indian trust funds by the Government. The ascertainability of damages in this kind of problem is one of the most easily soluble damage problems in law and in any event trustees have not been known to escape *liability* on the ground that damages are not calculable by the application of a predetermined arithmetical formula.

In connection with the ascertainment of damages it should be noted that the Government misconstrues Judge Davis' dissenting opinion with respect to the measure of damages. Judge Davis noted (A. 77-78) that in the 1850's the Government treated agreements to invest in

safe and profitable stocks as satisfied by the appropriation of five percent interest from time to time, thus showing that five percent interest was treated by the Government as the equivalent, and this affords the Court a standard for measuring damages. On pages 11-13 of its brief, the Government says that the Indian creditors could not compel the Government to pay interest rather than invest in stocks, and that the Commissioner of Indian Affairs wanted to change the policy of appropriating the interest rather than purchasing the stocks. Petitioners are not attempting to compel the Government to do something now or to argue the merits of the Government's policy in the 1850's. The point about the Government's conduct in the 1850's is that it provides a standard to measure damages for failure to invest.

The Government argues (pp. 16-17) that we do not know how much of the $172,000 the President would have determined to invest and how much he would have determined to pay over, because allocation is allegedly influenced by the size of the fund. The Government has failed to take into account the matters cited by petitioners, demonstrating that the standard on which the President was to make an allocation under the treaty was to pay over to the Indians only so much as they actually needed, and to invest the balance. On the funds which actually were realized from the sale, the determination was made that the actual needs of the Indians were satisfied by a small portion, $59,641.45, of the receipts. It would thus appear that the determination of their needs was already made, and the funds which should have been realized were therefore in the category of those funds which were to be invested. It should also be noted, however, that in fact the fund here in question was neither paid over nor invested and, therefore, regardless of the standard by which the allocation was to be made, the Indians lost the benefit of the income which should have been earned had the treaty been complied with.

The Government's final argument is that the treaty "does not provide" for the circumstances presented here. "The fund involved here was not received for the sale of land; it was not allocated by the President for investment; and it was not invested." In part, this is a repetition of the argument noted above, and is inconsistent with the holding of the *Blackfeather* and *Mille Lac* case that provisions for investment apply to funds which should have been as well as those which were actually received. In part, it is an argument that the treaty does not contemplate that the Government would breach it. But the purpose of these proceedings is to put the Indians in the position they would have enjoyed had the Government complied with the treaty. It has already been established that if the Government had complied, it would have realized $172,726.04 in 1857. It is further evident that, if the Government had realized this additional sum, the treaty required that it be paid over or invested. It was not realized; it was not paid over or invested. The Indians have suffered the loss of the resulting income and they are entitled by reason of the affirmative, explicit and clear-cut provision of the treaty to recover as damages the income their money should have earned.

Respectfully submitted,

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